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MBF FACTORS SDN BHD

v.

BAN HOO ELECTRICAL & FURNITURE SDN BHD

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-04-19-02]

C

5 AUGUST 2008

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Time limit for filing and service, how reckoned - Whether time reckoned from service of sealed or unsealed copy of notice of application - Subordinate Courts Rules 1980, O. 24*

D

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Whether delay in filing affidavit-in-reply curable under rules of court - Rules of the High Court 1980, O. 1A - Subordinate Courts Rules 1980, O. 2*

E

CIVIL PROCEDURE: *Service - Notice of application - Whether notice of application ought to be filed and endorsed before service - Whether service of sealed and endorsed copy of application proper service - Whether service of unendorsed and unsealed copy of application mere notice of intention to file application - Subordinate Courts Rules 1980, O. 24*

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The plaintiff filed an action against the defendant in the Kuala Lumpur Sessions Court. The defendant applied to transfer the action to the Alor Setar Sessions Court. On 11 June 1998, the defendant served on the plaintiff an unendorsed copy of the notice of application and supporting affidavit. A properly endorsed copy of the notice of application and supporting affidavit was served on the plaintiff on 1 July 1998. On 14 July 1998, the plaintiff served on the defendant an affidavit-in-reply. This was 33 days after the defendant's service of the unendorsed copy of the notice of application on the plaintiff, but only 13 days after the defendant's service of the properly endorsed notice. The defendant raised a preliminary objection in the Sessions Court concerning the admissibility of the plaintiff's affidavit-in-reply on the basis that it was filed out of time. The objection was allowed both in the Sessions Court and in the High Court on appeal. The plaintiff thus appealed to the Court of Appeal.

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Held (allowing the appeal with costs)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) By virtue of O. 24 r. 2(1) and O. 24 r. 4(1)(a) of the SCR 1980, notices of application or affidavits have first to be filed before any subsequent action is taken. In the instant case, although the defendant had claimed to have first filed the application and affidavit before serving them on the plaintiff, the claim was rather dubious. It was unlikely that the documents had been filed as they were served unsealed, unsigned and undated. No receipt was franked or stamped upon the relevant document. (paras 7, 8, 9 & 10)

(2) The unendorsed notice of application and affidavit were not part of the sealed, signed and dated notice of application. At best, the unendorsed notice served as mere notice of intention on the part of the defendant to file and serve a notice of application and supporting affidavit on the plaintiff. With the defendant relying on the served endorsed document, the plaintiff's affidavit-in-reply was indeed served on the defendant within time. (para 11)

(3) Order 24 r. 4(2)(b) of the SCR cannot be read in isolation or independently of the other provisions. Order 24 r. 2(1), r. 4(1)(a) read together with O. 24 r. 4(2)(b) of the SCR require any notice of application and supporting affidavit to be filed and endorsed first before service. *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong* (foll); *Elite Jewellers Sdn Bhd v. Wong Tin Kai* (refd); *Malaysian Indian Congress & Ors v. Makkal Osai Sdn Bhd & Anor* [2001] 1 CLJ 579 (refd); *Usman bin Ahmad v. Chin Brothers Construction Co* (foll); *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* (not folld). (paras 12, 13, 14 & 15)

(4) Under O. 1A of the RHC 1980, the court has a duty to ensure that the justice of a particular case is preserved. Further, under O. 2 of the SCR 1980, certain non-compliance of the rules may be treated as irregularities and will not nullify the proceedings. In the instant case, even if there was a delay by the plaintiff in filing its affidavit-in-reply, such delay was a mere irregularity curable under O. 2 of the RHC 1980 and would not affect the affidavit's admissibility. (para 16)

A ***Obiter:***

(1) The plaintiff's application and the defendant's preliminary objection should have been heard in chambers instead of in open court in the Sessions Court. The Sessions Court's order
B thus revealed an error. However, it was no longer important as the decision was appealed against and a rehearing had taken place before the High Court Judge. (paras 5 & 6)

Bahasa Malaysia *Translation Of Headnotes*

C Plaintif telah memfailkan satu tindakan terhadap defendan di Mahkamah Sesyen di Kuala Lumpur. Defendan telah memohon untuk memindahkan tindakan ini ke Mahkamah Sesyen di Alor Setar. Pada 11 Jun 1998, defendan telah menyerahkan sesalinan permohonan tersebut yang belum dimeterai oleh mahkamah dan
D affidavit sokongannya ke atas plaintif. Sesalinan bermeterai permohonan tersebut dan affidavit sokongannya telahpun diserahkan ke atas plaintif pada 1 Julai 1998. Plaintif telah menyerahkan afidavit balasannya ke atas defendan pada 14 Julai 1998 yakni 33 hari selepas defendan menyerahkan sesalinan
E permohonan tersebut yang belum dimeterai oleh mahkamah, tetapi 13 hari selepas penyerahan salinan bermeterai permohonan tersebut ke atas plaintif. Defendan telah membangkitkan suatu bantahan awal berkenaan penerimaan afidavit balasan plaintif di Mahkamah Sesyen atas alasan bahawa ianya telah difailkan di luar
F jangkamasa yang ditetapkan. Bantahan awal itu telah dibenarkan di Mahkamah Sesyen dan kemudiannya di Mahkamah Tinggi setelah rayuan difailkan. Plaintif seterusnya telah merayu kepada Mahkamah Rayuan.

G **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Mengikut A. 24 k. 2(1) dan A. 24 k. 4(1) Kaedah-Kaedah Mahkamah Rendah 1980, notis permohonan dan afidavit harus
H difailkan sebelum tindakan lain diambil. Dalam kes ini, walaupun defendan telah mendakwa bahawa mereka telah memfailkan permohonan dan affidavit sebelum mereka menyerahkannya ke atas plaintif, dakwaan mereka diragui. Tidak mungkin dokumen tersebut telah difailkan kerana ianya
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telah diserahkan dalam keadaan dimana ianya tidak dimeterai, tidak ditandatangan dan tidak bertarikh. Dokumen tersebut juga tidak mengandungi tanda penerimaan sama ada secara tanda pos berbayar ataupun tanda setem.

(2) Sesalinan permohonan yang belum dimeterai oleh mahkamah dan afidavitnya tidak merupakan sebahagian permohonan yang bermerterai, bertanda tangan dan bertarikh. Sesalinan permohonan tersebut yang belum dimeterai oleh mahkamah hanya merupakan notis mengenai niat pihak defendan untuk memfailkan permohonan sedemikian berserta dengan afidavitnya ke atas plaintif. Dengan defendan bergantung kepada dokumen yang dimeterai dan diserahkan, maka afidavit balasan plaintif telah diserahkan kepada defendan dalam tempoh masa yang ditetapkan.

(3) Aturan 24 k. 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 tidak boleh dibaca secara sendiri atau berasingan daripada lain-lain peruntukan. Aturan 24 k. 2(1), k. 4(1)(a) dibaca bersama dengan A. 24 k. 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980, memperuntukkan bahawa notis permohonan dan afidavit sokongannya harus difailkan dan dimeterai sebelum ianya dapat diserahkan. *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong* (diikuti)*; Elite Jewellers Sdn Bhd v. Wong Tin Kai* (dirujuk)*; Malaysian Indian Congress & Ors v. Makkal Osai Sdn Bhd & Anor* (dirujuk)*; Usman Ahmad v. Chin Brothers Construction Co* (diikuti)*, Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* (tidak diikuti).

(4) Di bawah A. 1A Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah mempunyai tanggungjawab untuk memastikan bahawa keadilan sesuatu kes dikekalkan. Tambahan pula di bawah A. 2 Kaedah-Kaedah Mahkamah Rendah 1980, ketidakpatuhan kepada sesetengah kaedah boleh dianggap hanya sebagai di luar aturan dan tidak akan membatalkan prosiding. Di dalam kes ini, walaupun terdapat kelewatan di pihak plaintif dalam memfailkan afidavit balasannya, kelewatan tersebut merupakan sesuatu perkara di luar aturan dan dapat diperbetulkan dibawah A. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 dan tidak memberi kesan kepada penerimaan affidavit tersebut.

A ***Obiter:***

(1) Permohonan plaintif dan bantahan awal defendan di Mahkamah Sesyen sepatutnya didengar di dalam kamar. Oleh itu, keputusan Mahkamah Sesyen telah menampakkan suatu
B kesilapan. Tetapi ini tidak lagi penting kerana rayuan telah dibuat terhadap keputusan tersebut dan pendengaran semula telah berlaku di hadapan seorang Hakim Mahkamah Tinggi.

Case(s) referred to:
Elite Jewellers Sdn Bhd v. Wong Tin Kai [1998] 3 CLJ Supp 115 HC ***(refd)***
C *Malaysian Indian Congress & Ors v. Makkal Osai Sdn Bhd & Anor [2001] 1 CLJ 579 HC* ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(foll)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1
D *CLJ 300 CA* ***(not foll)***
Usman Ahmad v. Chin Brothers Construction Co [2000] 4 CLJ 785 HC ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 2, O. 32 r. 13(2)(b)
E Subordinate Courts Rules 1980, O. 2, O. 24 rr. 1(1), 2(1), 4(1)(a), (2)(b), O. 32 r. 13(2)(b)

For the appellant - HQ Kwong; M/s Heiley Hassan Tan & Partners
For the respondent - In person

F *[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R1-12-404-1998]*

[Editor's note: For the High Court judgment, please see MBf Factors Sdn Bhd Ban Hoo Electrical & Furniture Sdn Bhd [1999] 7 CLJ 337.]

Reported by Andrew Christopher Simon
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JUDGMENT

Suriyadi Halim Omar JCA:

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[1] The High Court had refused the plaintiff's appeal against the decision of the Sessions Court judge, who allowed the defendant's preliminary objection on the admissibility of the plaintiff's affidavit-in-reply dated 8 July 1998. Being dissatisfied the plaintiff,
I hereinafter referred to as the appellant, filed this appeal. Before us we allowed the appeal with costs and accordingly set aside the order of the High Court.

[2] The appellant had filed a civil suit at the Kuala Lumpur Sessions Court against the defendant, hereinafter referred to as the respondent, based on a factoring agreement entered between the appellant and a company called Shuang Hor Engineering Services. The respondent subsequently filed an application to transfer the case to the Alor Setar Sessions Court. An unsealed, unsigned and undated copy of the notice of application and the supporting affidavit (hereinafter collectively referred to as the unendorsed notice of application/unendorsed documents), which had been filed in the Sessions Court were served on the appellant on 11 June 1998. A sealed, signed and dated copy of the said notice of application (hereinafter collectively referred to as 'the endorsed notice of application/endorsed documents') supported by an affidavit followed in their wake. They were served on the appellant on 1 July 1998. The appellant on 14 July 1998 served on the respondent an affidavit-in-reply, 33 days after the respondent's unendorsed copy of notice of application was served on the appellant, and 13 days after the endorsed notice of application was served on the appellant. The respondent took up a preliminary objection in the Sessions Court as to the admissibility of this alleged late affidavit, on the grounds that it was filed out of time. This objection was upheld at that subordinate court and the High Court hence the appeal before us.

[3] The respondent had contended to this panel that, time under O. 24 r. 4(2) (b) of the Subordinate Courts Rules 1980 (SCR), starts to run upon the unendorsed notice of application, together with the supporting affidavit, were served on the appellant. As the respondent was only served with the appellant's affidavit-in-reply on 14 July 1998 ie, 33 days after service of the unendorsed notice of application, the said affidavit-in-reply was contended as inadmissible as it was served well past the "14 days" period. The appellant's view was that mere filing by the respondent did not suffice. It must be sealed or endorsed first before service could take place.

[4] From the above set of facts the question this panel had to resolve was:

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> Is the statutory period of 14 days provided for under O. 24 r. 4(2)(b) of the SCR 1980, where a party intends to reply a supporting affidavit served on him, applicable only to an affidavit where the notice of application has been filed and in the course of it duly sealed, signed, and dated, or irrespective of the status of that notice of application?

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[5] To answer the above question, certain parameters will have to be established first, but focusing only on an application in the course of proceedings in chambers before judgment. By the very nature of this application, let alone the respondent had alluded to C O. 24 SCR in support of its preliminary objection, the matter should have been heard in chambers instead of in open court at the subordinate court's level. Order 24 r. 1(1) SCR reads:

> 1. (1) Where by these rules an application in the course of any D proceedings before or after judgment is expressly or by implication authorized to be made to the Court, such application must be made by notice and **shall be heard in Chambers** (emphasis added).

[6] The court's order dated 5 August 1998 clearly indicates that E error. But that flaw became much water under the bridge when the decision was appealed against and a rehearing took place before the learned High Court judge.

[7] Apart from the requirement of forum, the Subordinate Court F Rules 1980 also provide for the procedural rules, beginning with the notice of application, amongst others, having to be sealed by an officer of the registry (O. 24 r. 2(1) SCR). This rule reads as follows:

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> 2.(1) Issue of a notice by which an application in Chambers is to be made takes place on its being sealed by an officer of the Registry.

[8] In a nutshell, that notice of application has to be filed, with that requirement clearly stated in the above provision. Perusing H this order further, a party filing an affidavit in support of a chamber matter that falls under O. 24 r. 4(1)(a) SCR, must adhere to certain statutory demands, in the like of giving notice to every other party of the filing or as the case may be of his intention to file. I reproduce this pertinent provision:

I

4(1) Any party

(a) **filing** an affidavit intended to be used by him in any proceedings in Chambers; or

(b) ....

must give notice to every other party of the filing or, as the case maybe, of his intention to do so.

[9] In the current appeal, the respondent complying with the above provision did file an affidavit in support together with the notice of application, but for some reason had served an unendorsed notice of application. In response to the affidavit in support, the appellant served on the respondent an affidavit in reply on 14 July 1998, agreeably within time after the endorsed notice of application and supporting affidavit had been served on the appellant, though out of time in relation to the unendorsed notice of application. The relevant provision pertaining to the appellant's affidavit in reply is O. 24 r. 4(2)(b) SCR and it reads:

a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

[10] From the above reading of the supplied provisions, and highlighted for our appreciation, whether it is advertence to the notice of application, or allusion to any affidavit, parties are statutorily required to file them first before any subsequent action is undertaken. The respondent had submitted that prior to serving the unendorsed documents it had filed them. We found this assertion rather dubious, as evidentially it is unlikely that the notice of application had been filed at the Sessions Court, bearing in mind that the documents that were served were unsealed, unsigned and undated. Anyone who has some experience of filing anything at any court registry will know that on filing a document, a fee will be charged, and a receipt in a "franked" form will be issued or stamped on the relevant document. A date will invariably be recorded forthwith on that franked receipt or the document proper. Here not even a date was found on any document despite the allegation of it having been filed.

[11] Without the notice of application being sealed, signed and dated, this panel believed that the served unendorsed notice of application, with the affidavit in support, never formed part of the filed set. At best it served as mere notice of the intention on the part of the respondent to file and serve a notice of application and its supporting affidavit on the respondent. With no follow-up rectification action having been undertaken that flawed notice of application and the supporting affidavit carried no legal effect and required no reply. Since the endorsed documents were eventually extracted from the court and were served on the appellant, the respondent was at no time prejudiced. With the respondent now forced to rely on the surviving served endorsed document, the affidavit in reply thus was indeed served on the respondent within time.

[12] In the unlikely event that this panel erred as regards the evidence, it must be understood that a provision, in this case O. 24 r. 4(2)(b) SCR, cannot be read in isolation or independently of the other provisions as provided above. Even though the latter provision does not state in so many words that the served affidavit in support must be endorsed, we are of the view that, by virtue of the construction of O. 24 r. 2(1) and O. 24 r. 4(1)(a), read together with O. 24 r. 4(2)(b) SCR any notice of application and any supporting affidavit must be filed and endorsed first before service. Anything less cannot be entertained. We are not alone in holding this view. In the Court of Appeal's case of *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, the court had occasion to discuss O. 32 r. 13(2)(b) Rules of the High Court 1980 (RHC 1980), which is in *pari materia* with O. 24 r. 4(2)(b) of the SCR 1980. The issue to be resolved was not dissimilar to the one before us and Siti Norma Yaakob JCA had stated:

> … We now ask ourselves what is the status of the affidavit in support served together with the unsealed summons? Does it require an immediate reply by the respondent within the 14 days as required by the Rules?
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> …

> We reply in the negative as the purpose of serving the unsealed copy of the summons and the affidavit in support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It cannot do anything more than this as the unsealed copy of the summons has yet to get the official stamp of the court to clothe it with the authority that it has been issued pursuant to Order 32, r. 2(1) of the RHC. The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it. For this very reason, we consider that the obligation to reply has not arisen when the unsealed copy of the summons together with the affidavit in support was served for the first time on the respondent on March 3 1995.

[13] This case was later referred to and followed by Abdul Malik Ishak J in *Elite Jewellers Sdn Bhd v. Wong Tin Kai* [1998] 3 CLJ Supp 115 where he thereafter held that a summons in chambers is not a summons until it is signed, sealed and dated by the court (see also *Malaysian Indian Congress & Ors v. Makkal Osai Sdn Bhd & Anor* [2001] 1 CLJ 579). In fact, my learned brother Abu Samah b Nordin J (as he then was) in *Usman Ahmad v. Chin Brothers Construction Co* [2000] 4 CLJ 785, had occasion to specifically discuss O. 24 r. 4(2)(b) SCR, and had opined:

> Order 24 r. 4(2)(a) and (b) of the SCR is in *pari materia* with Order 32 r. 13(2)(a) and (b) of the Rules of the High Court ("RHC") and as such authorities in respect of the latter provision may be relied upon in construing the former provision.
>
> …
>
> It appears to me that Order 24 r. 4 of the SCR does not prohibit the parties from serving an unsealed copy of the application together with a supporting affidavit, which is yet to be filed or pending the issue of a filed copy but such action is outside and not within the ambit of the said provision. It is merely to give an advance notice, or to alert the other party of a forthcoming application. Hence, in my view, the decision in *Perbadanan National Insurans Sdn Bhd* is preferable to that of *Structural Concrete Sdn Bhd.* In our case, the appellant served the sealed copy of the application and its supporting affidavit on the respondent on October 21, 1997. The respondent filed and served its affidavit-in-reply on November 4, 1997. This was well within the 14 days period as prescribed by Order 24 r. 4(2)(b) of the SCR.

[14] Perusing the notes of proceedings and the grounds of judgment of the learned judge in this appeal, the case of *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, which was discussed in *Usman Ahmad v. Chin Brothers Construction Co (supra)*, was also considered. The Court of Appeal in *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd*, which had taken the opposite view to that of *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong*, when discussing the abovementioned O. 32 r. 13(2)(b) of the RHC 1980, had decided that time ran not from the date on which the summons in chambers was sealed but from the date on which the summons in chambers was filed.

[15] Having scrutinized *Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong (supra)*, which was decided about two months after the *Structural Concrete (supra)* by a different panel of the Court of Appeal, based on the above earlier reasoning, it is our respectful view that the former case is preferred by us.

[16] To wind up the matter, and to consider an alternative proposition, it must be stated that under O. 1A RHC 1980, the court has a duty to ensure that the justice of a particular case is preserved. Further under O. 2 of the SCR 1980, certain non-compliance of the rules may be treated as irregularities and shall not nullify the proceedings, any step in the proceedings, or any documents. Similar provisions are also found in O. 2 of the RHC 1980. In the circumstances of the case, even if there was a delay of a couple of weeks, of which we say there was none, by no stretch of the imagination that the appellant's affidavit deserved to be disallowed and the appellant deprived of its day in court. We therefore hold that even if there was a delay, it was merely an irregularity curable under O. 2 RHC 1980 and thus admissible.

[17] On the above reasons we had allowed the appeal with costs and accordingly set aside the High Court order.